

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 LAWRENCE R. SLAUGHTER,

Case No. 2:15-cv-00392-PAL

8 Plaintiff,

9 v.

ORDER

10 NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

(Mot. to Remand – ECF No. 19)
(Cross-Mot. Summ. J. – ECF No. 22)

11
12 Defendant.

13 This matter involves Plaintiff Lawrence R. Slaughter’s appeal and request for judicial
14 review of the Acting Commissioner of Social Security, Defendant Nancy A. Berryhill’s final
15 decision denying his claims for disability insurance benefits under Title II of the Social Security
16 Act (the “Act”), 42 U.S.C. §§ 401–33, and supplemental security income under Title XVI of the
17 Act, 42 U.S.C. §§ 1381–83.¹

18 **BACKGROUND**

19 On May 26, 2011, Plaintiff Lawrence R. Slaughter (“Slaughter”) protectively filed
20 applications for a period of disability and disability insurance benefits and Supplemental Security
21 Income (SSI) benefits, alleging disability beginning on September 15, 2009. AR 173–84.² He
22 was 57 years old when he applied. AR 32, 51. Mr. Slaughter’s work history included jobs in
23

24 ¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security. Pursuant to the Federal Rules of
25 Civil Procedure and the Social Security Act, the court therefore substitutes Nancy A. Berryhill for Carolyn
26 W. Colvin as the defendant in this suit. *See* Fed. R. Civ. P. 25(d) (allowing the automatic substitution of a
27 successor to a public officer who is a party to an action but ceases to hold office while the action is pending);
42 U.S.C. § 405(g) (“Any action instituted in accordance with this subsection shall survive notwithstanding
any change in the person occupying the office of Commissioner of Social Security or any vacancy in such
office.”).

28 ² AR refers to the Administrative Record (ECF No. 18-1), a certified copy of which was delivered to the
undersigned upon the Commissioner’s filing of her Answer.

1 telemarketing from 1997 to 1999 and as a patient transporter in a hospital from 2000 to 2009.
2 AR 36. In his application, Slaughter claimed he was unable to work because of: Paget’s disease,
3 diabetes, and carpal tunnel syndrome. AR 201. The Social Security Administration (the
4 “Agency”) denied his application initially and on reconsideration. AR 120–24.

5 An administrative law judge (“ALJ”) held a hearing on June 26, 2013, where Mr. Slaughter
6 appeared with counsel. AR 48–69. During the hearing, counsel asserted that Slaughter’s theory
7 of the case was that he was unable to perform the full range of sedentary work based on his diabetes
8 and pain in his back, hips, and other joints. AR 54–55. In a decision dated January 21, 2014, the
9 ALJ found that Slaughter was not disabled. AR 29–45. Mr. Slaughter requested review of the
10 ALJ’s decision by the Appeals Council, but the ALJ’s decision became final when the Appeals
11 Council denied review on January 15, 2015. AR 1–7.

12 On March 4, 2015, Slaughter timely filed his Complaint (ECF No. 1) in federal court,
13 seeking judicial review of the Commissioner’s decision pursuant to 42 U.S.C. § 405(g). The
14 Commissioner filed her Answer (ECF No. 15) on December 15, 2015. Slaughter filed a Motion
15 to Remand (ECF No. 19), and the Commissioner filed a Cross-Motion for Summary Judgment and
16 Response (ECF Nos. 22, 23). The court has considered the Motion, the Cross-Motion and
17 Response, and Mr. Slaughter’s Reply (ECF No. 24).

18 **DISCUSSION**

19 **I. APPLICABLE LAW**

20 **A. Judicial Review of Disability Determination**

21 District courts review administrative decisions in social security benefits cases under 42
22 U.S.C. § 405(g). *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). The statute provides
23 that after the Commissioner has held a hearing and rendered a final decision, a disability claimant
24 may seek review of that decision by filing a civil lawsuit in a federal district court in the judicial
25 district where the disability claimant lives. 42 U.S.C. § 405(g). The statute also provides that the
26 district court may enter, “upon the pleadings and transcripts of the record, a judgment affirming,
27 modifying, or reversing the decision of the Commissioner of Social Security, with or without
28 remanding the cause for a rehearing.” *Id.*

1 The Commissioner’s findings of fact are conclusive if supported by substantial evidence.
2 42 U.S.C. § 405(g); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). But the Commissioner’s
3 findings may be set aside if they are based on legal error or not supported by substantial evidence.
4 *Stout v. Comm’r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006); *Thomas v. Barnhart*, 278
5 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines substantial evidence as “ ‘such relevant
6 evidence as a reasonable mind might accept as adequate to support a conclusion’.” *Shaibi v.*
7 *Berryhill*, 883 F.3d 1102, 1106 (9th Cir. 2017) (quoting *Molina v. Astrue*, 674 F.3d 1104, 1110
8 (9th Cir. 2012)); *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (stating that substantial
9 evidence is “more than a mere scintilla but less than a preponderance”). In determining whether
10 the Commissioner’s findings are supported by substantial evidence, a court “must consider the
11 entire record as a whole and may not affirm simply by isolating a ‘specific quantum of supporting
12 evidence’.” *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir. 2014) (quoting *Hill v. Astrue*, 698
13 F.3d 1153, 1159 (9th Cir. 2012)).

14 Under the substantial evidence test, a court must uphold the Commissioner’s findings if
15 they are supported by inferences reasonably drawn from the record. *Batson v. Comm’r Soc. Sec.*
16 *Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2003). When the evidence will support more than one
17 rational interpretation, a court must defer to the Commissioner’s interpretation. *Shaibi*, 883 F.3d
18 at 1108 (quoting *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)). Consequently, the issue
19 before a court is not whether the Commissioner could reasonably have reached a different
20 conclusion, but whether the final decision is supported by substantial evidence and free of legal
21 error. *Id.* (citing 42 U.S.C. § 405(g); *Gutierrez v. Colvin*, 844 F.3d 804, 807 (9th Cir. 2016)).

22 It is incumbent upon an ALJ to make specific findings so that a court does not speculate as
23 to the basis of the findings when determining if the Commissioner’s decision is supported by
24 substantial evidence. *See Burrell v. Colvin*, 775 F.3d 1133, 1140 (9th Cir. 2014). Mere cursory
25 findings of fact without explicit statements about what portions of the evidence were accepted or
26 rejected are not sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). An ALJ’s
27 findings should be comprehensive, analytical, and include a statement explaining the “factual
28 foundations on which the ultimate factual conclusions are based.” *Id.*; *see also Vincent v. Heckler*,

1 739 F.2d 1393, 1394–95 (9th Cir. 1984) (an ALJ need not discuss all the evidence in the record,
2 but must explain why significant probative evidence has been rejected).

3 **B. Disability Evaluation Process**

4 A claimant has the initial burden of proving disability. *Roberts v. Shalala*, 66 F.3d 179,
5 182 (9th Cir. 1995). To meet this burden, a claimant must demonstrate an “inability to engage in
6 any substantial gainful activity by reason of any medically determinable physical or mental
7 impairment which can be expected . . . to last for a continuous period of not less than 12 months.”
8 42 U.S.C. § 423(d)(1)(A). A claimant must provide specific medical evidence to support his or
9 her claim of disability. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998). If a claimant
10 establishes an inability to perform his or her prior work, the burden shifts to the Commissioner to
11 show that the claimant can perform other substantial gainful work that exists in the national
12 economy. *See Molina*, 674 F.3d at 1110 (noting that a claimant bears the burden of proof until the
13 final step in the evaluation process).

14 **II. THE ALJ’S DECISION**

15 An ALJ follows a five-step sequential evaluation process in determining whether a
16 claimant is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If at any
17 step an ALJ makes a finding of disability or non-disability, no further evaluation is required. 20
18 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003).

19 Here, the ALJ followed the five-step sequential evaluation process and issued an
20 unfavorable decision on January 21, 2014 (the “Decision”). AR 29–45. Mr. Slaughter does not
21 challenge the ALJ’s findings at steps one through three, but asserts legal error at step four. More
22 specifically, he argues that (1) the ALJ’s RFC assessment failed to properly account for his obesity,
23 and (2) the ALJ failed to properly evaluate his subjective complaints. Slaughter claims he is
24 capable of no more than sedentary exertion. Although he acknowledges that his past relevant work
25 as a telemarketer was sedentary, he “maintains that due to the impact of his pain, he would not be
26 able to perform his past relevant work or any other work on a full-time, consistent basis.”

27 ///

28 ///

1 The parties stipulate that the ALJ fairly and accurately summarized the evidence and
2 testimony of record in the Decision, except as specifically addressed in their arguments. *See* Pl.’s
3 Mot. (ECF No. 19) at 5; Comm’r’s Cross-Mot. & Resp. (ECF Nos. 22, 23) at 2.

4 **A. Step One**

5 The first step of the disability evaluation requires an ALJ to determine whether the claimant
6 is currently engaging in substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). SGA
7 is defined as work activity that is both substantial and gainful; it involves doing significant physical
8 or mental activities, usually for pay or profit. 20 C.F.R. §§ 404.1572(a)–(b), 416.972(a)–(b). If
9 the claimant is currently engaging in substantial gainful activity, then a finding of not disabled is
10 made. If the claimant is not engaging in substantial gainful activity, then the analysis proceeds to
11 the second step.

12 At step one in the Decision, the ALJ found that Slaughter had not engaged in substantial
13 gainful activity since September 15, 2009, the alleged onset date. AR 34. Given Mr. Slaughter’s
14 lack of substantial gainful activity, the ALJ’s analysis proceeded to the second step.

15 **B. Step Two**

16 The second step of the disability evaluation addresses whether a claimant has a medically-
17 determinable impairment that is severe or a combination of impairments that significantly limits
18 him or her from performing basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). An
19 impairment or combination of impairments is not severe when medical and other evidence
20 establish only a slight abnormality or a combination of slight abnormalities that would have no
21 more than a minimal effect on the claimant’s ability to work. 20 C.F.R. §§ 404.1521, 416.921;
22 Social Security Ruling (“SSR”) 85-28, 1985 WL 56856 (Jan. 1, 1985), SSR 96-3p, 61 Fed. Reg.
23 34468 (July 2, 1996); SSR 96-4p, 61 Fed. Reg. 34488 (July 2, 1996).³ If a claimant does not have
24 a severe medically-determinable impairment or combination of impairments, then an ALJ will

25 ///

26
27 ³ SSRs are the Agency’s official interpretations of the Act and its regulations. *See Bray v. Comm’r Soc.*
28 *Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. § 402.35(b)(1). SSRs are entitled to
some deference as long as they are consistent with the Act and Agency regulations. *See Bray*, 554 F. 3d at
1223. “SSRs do not carry the ‘force of law,’ but they are binding on ALJs nonetheless.” *Id.* at 1224.

1 make a finding that a claimant is not disabled. If a claimant has a severe medically-determinable
2 impairment or combination of impairments, then an ALJ's analysis proceeds to the third step.

3 At step two in the Decision, the ALJ found that Slaughter had the following severe
4 impairments: (i) back disorder and compression, (ii) history of Paget's disease, (iii) diabetes
5 mellitus, (iv) hypertension, (v) gout, (vi) history of left carpal tunnel release with no residuals, and
6 (vii) obesity. AR 34. Because Mr. Slaughter had multiple severe medically-determinable
7 impairments, the ALJ proceeded to the third step.

8 The ALJ also noted that he had considered the Agency regulation related to obesity. AR 35
9 (citing SSR 02-1p, 67 Fed. Reg. 57859 (Sept. 12, 2002)). Mr. Slaughter testified that he weighed
10 254 pounds and was 6' tall; however, the ALJ found no evidence that Slaughter experienced any
11 end-organ disease. AR 35. The ALJ stated that the functional limitations adopted in the Decision
12 accounted for Slaughter's weight and its effect on his ability to ambulate as well as his other body
13 systems. *Id.*

14 **C. Step Three**

15 Step three of the disability evaluation requires an ALJ to determine whether a claimant's
16 impairments or combination of impairments meet or medically equal the criteria of an impairment
17 listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, which is commonly referred to as the
18 "Listings." 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.826. If
19 a claimant's impairment or combination of impairments meet or equal the criteria of the Listings
20 and meet the duration requirement, 20 C.F.R. §§ 404.1509, 416.909, then an ALJ makes a finding
21 of disability. 20 C.F.R. §§ 404.1520(h), 416.920(h). If a claimant's impairment or combination
22 of impairments does not meet or equal the criteria of the Listings or meet the duration requirement,
23 then the analysis proceeds to the next step.

24 At step three in the Decision, the ALJ found that no treating or examining physician stated
25 findings equivalent in severity to the criteria of any listed impairment. AR 35. Thus, the ALJ
26 concluded that Slaughter did not have an impairment or combination of impairments that meet or
27 medically equal one of the impairments described in the Listings. *Id.* As such, the ALJ's analysis
28 continued to Mr. Slaughter's residual functional capacity ("RFC").

1 **D. Step Four – RFC**

2 The fourth step of the disability evaluation requires an ALJ to determine whether a claimant
3 has the RFC to perform his past relevant work (“PRW”). 20 C.F.R. §§ 404.1520(f), 416.920(f).
4 To answer this question, an ALJ must first determine a claimant’s RFC. 20 C.F.R. §§ 404.1520(e),
5 416.920(e). RFC is a function-by-function assessment of a claimant’s ability to do physical and
6 mental work-related activities on a sustained basis despite limitations from impairments. SSR 96-
7 8p, 61 Fed. Reg. 34474 (July 2, 1996). In making this finding, an ALJ must consider all the
8 relevant evidence such as symptoms and the extent to which they can be reasonably be accepted
9 as consistent with the objective medical evidence and other evidence. 20 C.F.R. §§ 404.1529,
10 416.929; SSR 96-4p, 61 Fed. Reg. 34488 (July 2, 1996); SSR 96-7p, 61 Fed. Reg. 34483 (July 2,
11 1996). To the extent that statements about the intensity, persistence, or functionally limiting
12 effects of pain or other symptoms are not substantiated by objective medical evidence, an ALJ
13 must make a finding on the credibility of a claimant’s statements based on a consideration of the
14 entire case record. An ALJ must also consider opinion evidence in accordance with the
15 requirements of 20 C.F.R. §§ 404.1527 and 416.927 as well as SSR 96-2p, 61 Fed. Reg. 34489
16 (July 2, 1996); SSR 96-5p, 61 Fed. Reg. 34471 (July 2, 1996); and SSR 06-3p, 71 Fed. Reg. 45593
17 (Aug. 9, 2006).

18 After considering the entire record, the ALJ concluded that Mr. Slaughter had the RFC to
19 perform “the full range of light work as defined in 20 CFR 404.1567(b) and 416.967(b) - he can
20 lift and/or carry 20 pounds occasionally and 10 pounds frequently, stand and walk 4 hours *each* in
21 an 8-hour workday, and sit 6 hours in an 8-hour workday.” AR 35. In making this finding, the
22 ALJ “considered all symptoms and the extent to which these symptoms can reasonably be accepted
23 as consistent with the objective medical evidence and the other evidence.” *Id.* He also considered
24 opinion evidence. *Id.*

25 1. Credibility

26 The ALJ found Slaughter’s subjective pain complaints partially credible, but held that his
27 ability to participate in certain activities of daily living undermined the credibility of his allegations
28 of disabling functional limitations. AR 39. Mr. Slaughter testified that, due to his conditions, his

1 friend did his laundry and house cleaning. AR 36, 59. He stated he could not stand or walk more
2 than 45 minutes; he could not sit for more than an hour and a half; and he could not lift more than
3 20 pounds. AR 59. In an exertional daily activities questionnaire, Mr. Slaughter noted that his
4 pain made it hard for him to walk, stand, sit, and stoop AR 221. However, he reported that he
5 could shop for groceries once a month and clean his living area. AR 222. He also testified that he
6 could drive an automatic vehicle and spent time reading. AR 58–59. The ALJ found that “[s]ome
7 of the physical and mental abilities and social interactions required in order to perform these
8 activities are the same as those necessary for obtaining and maintaining employment.” AR 36.

9 2. Medical Symptoms

10 The ALJ discussed the treatment of Slaughter’s Paget’s disease, carpal tunnel syndrome,
11 low back and hip pain, knee pain, hypertension, gout, and diabetes. AR 36–37 (citing AR 259–
12 60, 265, 284, 286, 349–50, 383–86, 390). The ALJ noted that Mr. Slaughter’s treating physician,
13 Anthony Sommer, M.D., instructed Slaughter to “reduce his food portions and lose weight in
14 relation to his diabetes mellitus and obesity.” AR 37 (citing AR 402). The ALJ found that the
15 credibility of Slaughter’s allegations regarding the severity of his symptoms and limitations was
16 diminished because those allegations were greater than expected in light of the objective evidence
17 of record. AR 37. The Decision states that the positive objective clinical and diagnostic findings
18 after the alleged onset date did not support more restrictive functional limitations than what the
19 ALJ assessed. *Id.*

20 **E. Step Four – Ability to Perform PRW**

21 Once an ALJ has determined a claimant’s RFC as an initial consideration at step four, an
22 ALJ utilizes the RFC assessment to determine whether a claimant can perform his PRW. 20 C.F.R.
23 §§ 404.1520(f), 416.920(f). PRW means work a claimant performed within the last 15 years,
24 either as the claimant actually performed it or as it is generally performed in the national economy.
25 20 C.F.R. § 404.1560(b). In addition, the work must have lasted long enough for a claimant to
26 learn the job and to perform it as SGA. 20 C.F.R. §§ 404.1560(b), 404.1565, 419.960(b), 416.965.
27 If a claimant has the RFC to perform his or her past work, then an ALJ makes a finding that a
28 claimant is not disabled.

1 At step four in the Decision, the ALJ concluded that Mr. Slaughter is capable of performing
2 his PRW as a telemarketer, which is performed at a sedentary level of exertion with a specific
3 vocational profile (“SVP”) of 3 per the vocational expert’s testimony. AR 39.⁴ After comparing
4 Slaughter’s RFC with the physical and mental demands of his PRW, the ALJ found that Slaughter
5 is able to perform his PRW as it is generally performed. *Id.* As a result, he found that Slaughter
6 is not disabled.

7 Because the ALJ found that Mr. Slaughter is able to perform his PRW, the ALJ further
8 determined that he has not been disabled from September 15, 2009, through the date of the
9 Decision. AR 39. As such, there was no need to proceed to the fifth step.

10 **ANALYSIS AND FINDINGS**

11 **I. SLAUGHTER WAIVED THE ISSUE OF OBESITY BY FAILING TO RAISE IT BELOW**

12 Mr. Slaughter seeks reversal and remand of the ALJ’s decision on the grounds that the ALJ
13 failed to properly evaluate the effect of his obesity taken together with his other severe
14 impairments. Pl.’s Mot. (ECF No. 19) at 6–9. However, the issue of obesity was not raised in his
15 applications before the Agency or during his administrative hearing before the ALJ. In his
16 application, Slaughter claimed he was unable to work because of: Paget’s disease, diabetes, and
17 carpal tunnel syndrome. AR 201. During the June 2013 hearing, counsel asserted that Slaughter’s
18 theory of the case was that he was unable to perform the full range of sedentary work based on his
19 diabetes and pain in his back, hips, and other joints. AR 54–55. After the hearing, counsel
20 submitted proffer correspondence asserting, “Mr. Slaughter meets the requirements of Listing 1.02
21 regarding major dysfunction of a joint.” AR 246–47. Slaughter’s motion to remand does not claim
22 he meets the requirements for Listing 1.02.

23 An unfavorable decision was issued in January 2014. The ALJ determined that Slaughter’s
24 functional limitations take into account obesity. AR 35. In correspondence to the Appeals
25 Council, dated November 3, 2014, counsel argued for the first time, “Taking into account the
26 obesity, Mr. Slaughter lacks the capacity for the prolonged standing and walking required of light

27 ⁴ The Dictionary of Occupational Titles (DOT) describes Mr. Slaughter’s PRW as “telephone sales.”
28 AR 68 (citing DOT 299.357-014).

1 work.” AR 250 (emphasis added). Slaughter now argues the ALJ’s “ cursory discussion of obesity
2 does not satisfy the requirements of Social Security Ruling 02-1p.” Pl.’s Mot. at 8. Although the
3 ALJ found obesity to be a severe impairment, he provided no meaningful analysis of the effect of
4 obesity upon Slaughter’s ability to perform routine movement and necessary physical activity
5 within the work environment as required by SSR 02-1p. Reply (ECF No. 24) at 4.

6 When claimants are represented by counsel, they must raise all issues and evidence at their
7 administrative hearings in order to preserve them on appeal. *Shaibi v. Berryhill*, 883 F.3d 1102,
8 1109 (9th Cir. 2017) (quoting *Meanel v. Apfel*, 172 F.3d 1111 (9th Cir. 1999) (internal quotations
9 omitted)). This rule upholds the “fundamental principle that an agency, its experts, and its
10 administrative law judges are better positioned to weigh conflicting evidence than a reviewing
11 court.” *Id.* Such waiver is also consistent with the Social Security Act, which provides that “a
12 reviewing court presented with new evidence may remand to the agency for consideration of that
13 evidence, but only upon a showing of ‘good cause for the failure to incorporate such evidence into
14 the record in a prior proceeding’.” *Id.* (quoting 42 U.S.C. § 405(g)).

15 Here, the record demonstrates that counsel did not present the issue of obesity to the
16 Agency or the ALJ. Mr. Slaughter has not shown good cause, or suggested any reason at all, for
17 failing to raise the obesity issue below.

18 **II. THE ALJ FAILED TO PROVIDE CLEAR AND CONVINCING REASONS FOR DISCREDITING** 19 **MR. SLAUGHTER’S CREDIBILITY**

20 Mr. Slaughter also seeks reversal and remand of the ALJ’s decision on the grounds that the
21 ALJ failed to properly assess his credibility. Pl.’s Mot. at 9–14. Slaughter testified as to his
22 impairments and limitations. *Id.* at 11 (citing AR 53, 55–65). The medical evidence demonstrated
23 the existence of medically determinable impairments affecting his ability to perform the
24 requirements of work activity. *Id.* This met his burden of demonstrating the existence of a
25 condition that would cause some degree of limitation. *Id.* Slaughter argues the ALJ erroneously
26 found Slaughter not credible despite the presence of Slaughter’s reasonable and medically
27 supported testimony. *Id.* The ALJ discounted Slaughter’s testimony due to the extent of his daily
28 activities. *Id.* at 12 (citing AR 36). However, the ALJ made no attempt to explain a nexus between

1 Slaughter's activities and the rigors of full-time work activity. *Id.* (citing *Fair v. Bowen*, 885 F.2d
2 597, 603 (9th Cir. 1989) (noting that a "specific finding" regarding a transferable activity "may be
3 sufficient to discredit an allegation of disabling excess pain")). Because Slaughter's activities did
4 not rise to the level of full-time work activity, the ALJ's articulations were insufficient.
5 Furthermore, the ALJ improperly discounted Slaughter's credibility due to a lack of objective
6 evidence because this reason alone cannot form the basis of the ALJ's credibility determination.
7 *Id.* at 13 (citing *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986) (" 'Excess pain' is, by
8 definition, pain that is unsupported by objective medical findings.")). *see also* Reply at 7. If
9 properly credited, Mr. Slaughter's testimony demonstrates that he cannot work full-time. Thus,
10 remand for payment of benefits is appropriate. In the alternative, the court should remand this
11 matter for further administrative proceedings.

12 The Commissioner asserts that the ALJ properly assessed Slaughter's credibility and
13 determined that he is not disabled. Cross-Mot. & Resp. at 7–10. As a threshold matter, the
14 Commissioner notes that the ALJ did not completely discount Slaughter's complaints of pain. *Id.*
15 at 8. Rather, he found them only partially credible. The Commissioner argues that the ALJ
16 determined Slaughter capable of only light-exertion work, as opposed to work requiring greater
17 exertion, in the context of his subjective complaints and in accordance with certain physicians'
18 opinions. *Id.* (citing AR 39). The Decision noted Slaughter's improvement in the pain associated
19 with gout and bursitis, as well as objective medical findings of normal motor strength, sensation,
20 reflexes, and the ability to walk without difficulty as reasons that the medical record did not support
21 the degree of limitations Mr. Slaughter alleged. *Id.* at 8–9. Additionally, the Commissioner
22 maintains that the ALJ properly relied on the medical opinion evidence, including the findings of
23 examining physicians, which did not support disability and further undermined Slaughter's
24 credibility. The Commissioner also asserts that the ALJ properly found that Slaughter's admitted
25 ability to do his own grocery shopping and cleaning undermined his complaints of disabling pain.
26 *Id.* at 9–10 (citing AR 36). Because Mr. Slaughter identified no error in the ALJ's adverse
27 credibility determination, the Commissioner argues that the court should uphold it.
28

1 The Ninth Circuit has established a two-step analysis for determining the extent to which
2 a claimant’s symptom testimony must be credited. *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th
3 Cir. 2012); *see also Trevizo v. Berryhill*, 871 F.3d 664 (9th Cir. 2017). In the first step, the ALJ
4 must determine whether the claimant has presented objective medical evidence of an underlying
5 impairment that could reasonably be expected to produce the pain or other symptoms alleged.
6 *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014); *Bunnell v. Sullivan*, 947 F.2d 341, 344
7 (9th Cir. 1991) (en banc)). In this first step, a claimant need only show that his or her impairment
8 could reasonably have caused *some degree* of the symptom alleged. *Garrison*, 759 F.3d at 1014
9 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996)). A claimant is not required to
10 show that the impairment could reasonably be expected to cause the severity of the symptoms or
11 produce objective medical evidence of the pain, fatigue, or the severity thereof. *Id.*

12 If a claimant satisfies the first step of this analysis, and there is no evidence of malingering,
13 the ALJ may only reject the claimant’s testimony about the severity of his symptoms “by offering
14 specific, clear and convincing reasons for doing so.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493
15 (9th Cir. 2015); *see also Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006). As the
16 Ninth Circuit has recognized, this is not an easy requirement to meet because the “clear and
17 convincing standard is the most demanding required in Social Security cases.” *Garrison*, 759 F.3d
18 at 1015. However, “the ALJ is not required to believe every allegation of disabling pain,”
19 otherwise disability benefits “would be available for the asking, a result plainly contrary to 42
20 U.S.C. § 423(d)(5)(A).” *Molina*, 674 F.3d at 1112 (quoting *Fair*, 885 F.2d at 603).

21 In evaluating a claimant’s testimony, the ALJ may use “ordinary techniques of credibility
22 evaluation.” *Id.* (quoting *Turner v. Comm’r Soc. Sec.*, 613 F.3d 1217, 1224 n.3 (9th Cir. 2010)).
23 For example, an ALJ may consider factors such as: (i) inconsistencies either in the claimant’s
24 testimony or between the testimony and the claimant’s conduct; (ii) whether the claimant engages
25 in daily activities inconsistent with the alleged symptoms; or (iii) functional restrictions caused by
26 the symptoms. *Molina*, 674 F.3d at 1112; *Rounds*, 807 F.3d at 1006; *Smolen*, 80 F.3d at 1284.

27 “A finding that a claimant’s testimony is not credible ‘must be sufficiently specific to allow
28 a reviewing court to conclude the adjudicator rejected the claimant’s testimony on permissible

1 grounds and did not arbitrarily discredit a claimant’s testimony regarding pain’.” *Brown-Hunter*,
2 806 F.3d at 493 (quoting *Bunnell*, 947 F.2d at 345–46). “General findings are insufficient; rather,
3 the ALJ must identify what testimony is not credible and what evidence undermines the claimant’s
4 complaints.” *Brown-Hunter*, 806 F.3d at 493 (quoting *Reddick v. Chater*, 157 F.3d 715, 722 (9th
5 Cir. 1998)); *see also Rounds*, 807 F.3d at 1006 (an ALJ must specify “which symptom testimony
6 is not credible and what facts in the record lead to that conclusion”) (quoting *Smolen*, 80 F.3d at
7 1284). “Although the ALJ’s analysis need not be extensive, the ALJ must provide some
8 reasoning” that will allow a reviewing court “to meaningfully determine whether the ALJ’s
9 conclusions were supported by substantial evidence.” *Brown-Hunter*, 806 F.3d at 495 (quoting
10 *Treichler v. Comm’r Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014)).

11 The court finds the ALJ’ failed to provide specific, clear and convincing reasons for
12 rejecting Slaughter’s testimony about the severity of his symptoms. Mr. Slaughter satisfied the
13 first step of the credibility analysis by presenting objective medical evidence of underlying
14 impairments that could reasonably have caused some degree of his alleged symptoms. *See* AR 36–
15 37. The ALJ did not find evidence of malingering. AR 36–39; *see also* AR 444 (consultative
16 examination finding “no evidence to suggest symptom magnification”).

17 The ALJ found Slaughter’s subjective pain complaints only partially credible, because his
18 ability to shop for groceries once a month, clean his living area, drive an automatic vehicle, and
19 spend time reading undermined the credibility of his allegations of disabling functional limitations.
20 AR 36 (citing 58–59, 221). The ALJ found, without providing any explanation or analysis that
21 “[s]ome of the physical and mental abilities and social interactions required in order to perform
22 these activities are the same as those necessary for obtaining and maintaining employment.”
23 AR 36. The ALJ’s credibility determination did not find inconsistencies in Slaughter’s testimony
24 or statements, or that he failed to seek appropriate treatment or comply with prescribed treatment.

25 The Ninth Circuit has “repeatedly warned that ALJs must be especially cautious in
26 concluding that daily activities are inconsistent with testimony about pain, because impairments
27 that would unquestionably preclude work and all the pressures of a workplace environment will
28 often be consistent with doing more than merely resting in bed all day.” *Garrison*, 759 F.3d at

1 1016 (“The Social Security Act does not require that claimants be utterly incapacitated to be
2 eligible for benefits, and many home activities may not be easily transferable to a work
3 environment where it might be impossible to rest periodically or take medication.”); *Fair*, 885
4 F.2d at 603 (“[M]any home activities are not easily transferable to what may be the more grueling
5 environment of the workplace, where it might be impossible to periodically rest or take
6 medication.”). The Ninth Circuit recently found that “[h]ouse chores, cooking simple meals, self-
7 grooming, paying bills, writing checks, and caring for a cat in one’s home, as well as occasional
8 shopping outside the home, are not similar to typical work responsibilities.” *Diedrich v. Berryhill*,
9 874 F.3d 634, 643 (9th Cir. 2017).

10 Recognizing that “disability claimants should not be penalized for attempting to lead
11 normal lives in the face of their limitations,” the Ninth Circuit has held that a claimant’s activities
12 of daily living would have a bearing on her credibility only if her level of activity were inconsistent
13 with her claimed limitations. *Garrison*, 759 F.3d at 1016 (quoting *Reddick*, 157 F.3d at 722).
14 When an ALJ finds that a claimant’s daily activities are consistent with regularly attending a full-
15 time job, the ALJ must explain why those particular activities establish that the claimant has the
16 ability to maintain regular attendance at work. *Popa v. Berryhill*, 872 F.3d 901, 906 (9th Cir.
17 2017).

18 Here, the ALJ provided no explanation as to why Slaughter’s ability to shop for groceries
19 once a month, clean his living area on occasion, drive a car, and read novels establish that he had
20 the ability to perform full-time work. *See* AR 36, 59–60. The ALJ merely concluded that the
21 abilities and social interactions required for these activities are the same as those required for full-
22 time work. The court finds that the ALJ’s failure to explain how these activities were transferable
23 to a work environment is reversible error.

24 Furthermore, the ALJ’s credibility finding cherry-picked the record to discredit Slaughter’s
25 testimony, finding that there was a lack of objective medical evidence to support his complaints.
26 “Occasional symptom-free periods are not inconsistent with disability, and an ALJ may not
27 disregard a claimant’s testimony solely because it is not substantiated affirmatively by objective
28 medical evidence.” *Trevizo v. Berryhill*, 871 F.3d 664 (9th Cir. 2017) (quoting *Lester v. Chater*,

1 81 F.3d 821, 833 (9th Cir. 1995)), *Robbins*, 466 F.3d at 883 (internal quotation marks and
2 alterations omitted)). The ALJ partially discredited Mr. Slaughter’s claims that, among other
3 things, he could not stand or walk more than 45 minutes, sit for more than an hour and a half; or
4 lift more than 20 pounds, AR 59, because the “positive objective clinical and diagnostic findings
5 since the alleged onset date detailed above do not support more restrictive functional limitations
6 than those assessed” by the ALJ. AR 37. Mr. Slaughter presented objective medical evidence of
7 underlying impairments that could reasonably have caused some degree of his alleged symptoms,
8 and there was no evidence of malingering. *See* AR 36–39.

9 The Decision references isolated instances of improvement to show that the record did not
10 support the severity of Mr. Slaughter’s symptoms. AR 36–37 (citing AR 284, 356, 390, 439).
11 However, viewing the record as a whole, instances of improvement were sparse, and the record
12 was replete with reports of Slaughter’s chronic pain. *See* AR 264–73, 284, 289–291, 310–13, 315,
13 318, 349, 359, 362–63, 380, 389–90, 392–93, 402–03, 408–09, 414–15, 420, 423, 429–30, 439–
14 40. Notably, the ALJ relied on an April 3, 2013 treatment note by Dr. Sommer to show that
15 Slaughter’s “diabetes was improved.” AR 37 (citing AR 439). But the same treatment note also
16 states that Slaughter’s gout was worse, his obesity was severe, his hypertension was uncontrolled,
17 and he suffered from chronic pain. AR 439. The ALJ failed to provide specific, clear and
18 convincing reasons for discounting Mr. Slaughter’s testimony as to the severity of his symptoms.

19 Slaughter asks the court to apply the credit-as-true rule and remand for an award of benefits.
20 However, this is “a rare and prophylactic exception to the ordinary remand rule” that applies only
21 “when there is no question that a finding of disability would be required if the claimant’s testimony
22 is accepted as true.” *Leon v. Berryhill*, 880 F.3d 1041 (9th Cir. 2017). Typically, a social security
23 case should be remanded when “additional proceedings can remedy defects in the original
24 administrative proceeding.” *Garrison v. Colvin*, 759 F.3d 995, 1019 (9th Cir. 2014) (quoting
25 *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981)). “The Social Security Act, however, makes
26 clear that courts are empowered to affirm, modify, or reverse a decision by the Commissioner
27 ‘with or without remanding the cause for a rehearing’.” *Garrison*, 759 F.3d at 1019 (quoting 42
28 U.S.C. § 405(g)). Accordingly, the Ninth Circuit has recognized that “in appropriate

1 circumstances courts are free to reverse and remand a determination by the Commissioner with
2 instructions to calculate and award benefits.” *Id.* The three-part test for such circumstances is
3 known as the “credit-as-true” rule:

4 First, we ask whether the “ALJ failed to provide legally sufficient reasons for
5 rejecting evidence, whether claimant testimony or medical opinion.” [*Garrison*,
6 759 F.3d] at 1020. Next, we determine “whether there are ‘outstanding issues that
7 must be resolved before a disability determination can be made,’ ... and whether
8 further administrative proceedings would be useful.” *Treichler* [*v. Comm'r of Soc.*
Sec. Admin., 775 F.3d 1090, 1101 (9th Cir. 2014)] *quoting* *Moisa v. Barnhart*, 367
F.3d 882, 887 (9th Cir. 2004). When these first two conditions are satisfied, we
then credit the discredited testimony as true for the purpose of determining whether,
on the record taken as a whole, there is no doubt as to disability. *Id.*

9 *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). However, even if the court reaches the
10 third step and credits the claimant’s testimony as true it is still within the court’s discretion either
11 to make a direct award of benefits or remand for further proceedings. *Id.*

12 Mr. Slaughter asserts the court should credit his testimony as true and award benefits. The
13 credit-as-true rule “permits, but does not require, a direct award of benefits on review but only
14 where the [ALJ] has not provided sufficient reasoning for rejecting testimony and there are no
15 outstanding issues on which further proceedings in the administrative court would be useful.” *Id.*
16 at 1044. An automatic award of benefits in a disability benefits case is a rare and prophylactic
17 exception to the well-established ordinary remand rule. *Id.* (citing *Treichler*, 775 F.3d at 1100).
18 Here, the court has determined the ALJ failed to provide failed to provide specific, clear and
19 convincing reasons for rejecting Slaughter’s testimony. However, the rare circumstances that
20 justify an award are not present in this case. The court has a serious doubt as to whether Slaughter
21 was in fact disabled. A remand for further administrative proceedings would be useful in this case.
22 *See Leon*, 880 F.3d at 1047 (noting that remand is useful where “the presentation of further
23 evidence . . . may well prove enlightening in light of the passage of time,” regarding whether the
24 claimant’s symptoms are or would be significantly reduced with proper medical treatment)
25 (quoting *Treichler*, 775 F.3d at 1101); *Brown–Hunter v. Colvin*, 806 F.3d 487, 495–96 (9th Cir.
26 2015) (although the ALJ committed legal error, further administrative proceedings were useful
27 because questions existed about the extent to which the claimant’s symptoms rendered her
28 disabled).

1 **CONCLUSION**


2 Judicial review of a decision to deny disability benefits is limited to determining whether
3 the decision is based on substantial evidence reviewing the administrative record as a whole. It is
4 the ALJ's responsibility to make findings of fact, draw reasonable inferences from the record as a
5 whole, and resolve conflicts in the evidence and differences of opinion. Having reviewed the
6 Administrative Record as a whole, and weighing the evidence that supports and detracts from the
7 Commissioner's conclusion, the court finds that the ALJ's decision is not supported by substantial
8 evidence and remands this case pursuant to sentence four of 42 U.S.C. § 405(g) for further
9 proceedings consistent with this order.

10 Accordingly,

11 **IT IS ORDERED:**

- 12 1. The Clerk of Court shall **SUBSTITUTE** Nancy A. Berryhill for Carolyn W. Colvin as
13 the defendant in this suit.
- 14 2. Plaintiff Lawrence R. Slaughter's Motion for Reversal and/or Remand (ECF No. 19)
15 is **GRANTED**.
- 16 3. The Commissioner's Cross-Motion for Summary Judgment (ECF No. 22) is **DENIED**.
- 17 4. This matter is **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) for further
18 proceedings consistent with this Order.

19 Dated this 30th day of March, 2018.

20
21 
22 PEGGY A. LEEN
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28